CORRECTED COPY

IN THE

Supreme Court Of The United States

———— TERM, 1978

NO. ~~78~~-373

FINIS EUGENE TOOMER, JR. ..... *Petitioner*

VS.

STATE OF ARKANSAS ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of Arkansas entered June 5, 1978.

OPINIONS BELOW

The opinion of the Supreme Court of Arkansas (R. 110-113) was rendered on June 5, 1978. A dissenting opinion was filed (R. 114-116) on that same date. Both are printed in Appendices B and C, infra, pp. A-4 — A-10. Also, an unpublished Opinion of the trial court is appended as Appendix A, infra, p. A-1.

JURISDICTION

Jurisdiction on the Petition for a Writ of Certiorari arises under Part V, Rule 19 and 28 U.S.C. §1257(3). Petitioner would respectfully submit that there are special and important reasons to grant Petitioner's petition for the reason that the Supreme Court of Arkansas has decided a federal question of substance in a way probably not in accord with the applicable decisions of the United States Supreme Court.

Judgment in the trial court denying the Petitioner's motion to be declared an indigent defendant, for a free transcript and for appointment of counsel on appeal was entered January 16, 1978. (R. 6-8, Vol. II) The Opinion of the Arkansas Supreme Court was entered June 5, 1978. (R. 110-116, Vol. II) This Petition for writ of certiorari was filed within ninety (90) days of entry of the Opinion of the Arkansas Supreme Court.

QUESTION PRESENTED

The question presented in this Petition for Writ of Certiorari is whether an indigent, but able-bodied individual, having been convicted of a felony, and desiring an appeal to the Court of last resort in the State is entitled to a transcript with which to appeal and the appointment of counsel on appeal.

AMENDMENTS TO THE CONSTITUTION INVOLVED

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the

land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioner, Finis Eugene Toomer, Jr., originally appealed to the Arkansas Supreme Court on the merits from a conviction for rape entered on June 3, 1977. However, the Petitioner herein could not secure the required costs of appeal within the deadline for docketing the appeal record in the Arkansas Supreme Court. On December 7, 1977, almost one month prior to the deadline for lodging the transcript with the Supreme Court, Petitioner filed a motion to be declared an indigent for purposes of the appeal and requested a transcript at the cost of the State and for appointment of counsel on appeal. (R. 1-3, Supp. to Vol. II) A copy of the motion was filed with the trial judge, and the State's attorneys. (R. 1, Supp. to Vol. II) On December 21, 1977, Petitioner's attorney forwarded a letter to the trial judge advising him of the deadline for docketing the transcript of January 3, 1978, and requesting a hearing on the motion. (R. 2, Supp. to Vol. II) The trial court did not respond to the Petitioner's attorney's letter prior to January 3, 1978.

To protect the Petitioner's right of appeal, a partial transcript was filed within time on December 30, 1977, along with a Motion requesting the Arkansas Supreme Court to declare the Appellant to be an indigent, to provide for a transcript at the State's expense, for an extension of time within which to file a complete and full transcript, and for the appointment of an attorney. By Order of the Arkansas Supreme Court dated January 16, 1978, an extension of thirty days was granted and the trial court was reinvested with jurisdiction to determine the question of indigency and entitlement to transcript and appointment of attorney. On January 11, 1978, a hearing was held in

the trial court on Petitioner's motion to be declared an indigent, for a transcript at the expense of the State, and for the appointment of counsel. That motion was denied at the hearing, and a precedent was filed January 16, 1978. However, the Court ordered the preparation of a transcript of the proceedings upon Appellant's motion at the expense of the State. (R. 106, Supp. to Vol. II) From the order denying Petitioner's motion, Petitioner filed notice of appeal and designation of record and timely filed Volume II of the transcript which is a transcript of the record and the testimony in the trial court upon Petitioner's motion. The court clerk inadvertently failed to include two letters designated in the Petitioner's designation of record, and they were subsequently filed by stipulation of the attorneys to supplement the record.

On appeal to the Arkansas Supreme Court, the Arkansas Supreme Court affirmed the lower court decision but on different grounds. The trial court did not address the issue of indigency and made no finding on the question, whereas the Arkansas Supreme Court did address the issue of indigency. A dissenting opinion was filed in the Arkansas Supreme Court.

As a consequence of the opinion of the majority of the Arkansas Supreme Court, the Petitioner files this his Petition for Writ of Certiorari to the Supreme Court of the State of Arkansas based upon a violation of his federal constitutional rights secured to him under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution guaranteeing indigent defendants due process and equal protection by requiring the State to provide counsel and the necessary appeal record.

ARGUMENT

THE TRIAL COURT AND THE ARKANSAS SUPREME COURT VIOLATED PETITIONER'S FEDERAL CONSTITUTIONAL RIGHTS OF DUE PROCESS, EQUAL PROTECTION, AND RIGHT TO COUNSEL GUARANTEED TO HIM BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS BY DENYING PETITIONER'S MOTION TO BE DECLARED AN INDIGENT, FOR THE TRANSCRIPT AND RECORD AT THE STATE'S EXPENSE, AND FOR THE APPOINTMENT OF AN ATTORNEY ON APPEAL.

The Petitioner, Finis Eugene Toomer, Jr., filed his sworn motion to be declared an indigent on December 7, 1977 after judgment of conviction for rape on June 3, 1977, and after notice of appeal. The deadline for filing his transcript was January 3, 1978. By his motion supported by his affidavit under oath, the Petitioner notified the Court that he was unable to raise the $1,500.00 demanded by the court reporter prior to commencing the preparation of his appeal transcript, was unable to pay an attorney to perfect his appeal, and was unable to raise the money necessary for printing his appeal brief. The entire expected cost on appeal was in the area of $4,600.00. (R. 25-26, Vol. II) The Petitioner was seventeen years of age at the time the charge was brought and his father, through borrowed funds, had paid approximately $3,000.00 for the defense of his son. (R. 29-30, 59, Vol. II) The trial was held on June 1st through 3rd, 1977, and a judgment of conviction for rape was entered (R. 34, Vol. I) and appeal was filed on June 3, 1977. (R. 35, Vol. I)

The court reporter, Daisy B. Steel, required a deposit of $1,500.00 before preparing the Bill of Exceptions and

indicated the cost would likely exceed $1,500.00. (R. 82-83, 94, and 102, Vol. II) In a letter to Petitioner's attorney, the court reporter stated, "I cannot start the transcript until I have received the amount I have previously requested on three occasions . . ." (R. 102, Vol. II)

By order of the court, on the 13th day of June, 1977, the court found that, "For good cause shown, it appearing that the court reporter will have difficulty in preparing the transcript in this cause within the ninety days allowed by law for docketing appeal to the Arkansas Supreme Court, IT IS ORDERED that Defendant's time for lodging the appeal in this cause in the Supreme Court of Arkansas be extended for seven months from June 3, 1977." (R. 38, Vol. I) By letter dated September 30, 1977, the court reporter stated that she was then ready to start on the transcript in this cause. She stated, however, that "before doing so, I would appreciate it if you would contact your client and have him send an advancement of $1,500.00 on the cost of the transcript." (R. 94, Vol. II) By letter dated October 4, 1977 to the Petitioner and his parents, notice was given to the Petitioner of the court reporter's demand for $1,500.00. From the receipt of that message, the Petitioner and his parents exhausted their efforts to raise the $1,500.00 for a cost deposit on the transcript. They were also advised that additional funds would be required in the amount of $2,500.00 for an attorney's fee on the cost of preparing and perfecting the appeal as well as a cost of printing the brief in the approximate amount of $600.00.

For approximately two months, the Petitioner and his father attempted to raise the required $1,500.00 cost deposit to begin the transcript. Their testimony reflects their efforts to borrow the money from relatives, by borrowing

from the father's employer, by loans from banks, and otherwise. Some hope was held out by relatives but around the first of December, 1977, almost two months after notice of the demand for a cost deposit was received by them, the father realized he could not raise the money. According to the testimony of the father, "I just kept thinking that I might come across and get the money, but I just couldn't. I had two brother-in-laws that I thought would let me have the money. I first contacted them about getting the money whenever she told us she needed $1,500.00. They said they would see. You know, they would check to see if they could let me have the money and every time I would talk to them, they would say, well, they was going to check. Then finally, they just wouldn't do it."

It must be remembered that the Petitioner, although a minor at the time of the alleged facts, is now an adult. Although the father was not perhaps legally responsible for his son's obligations, the father desired to pay the expenses of the appeal. With a positive attitude of determination to raise the money, no question was ever raised by the father on behalf of his son, and his son never questioned the ability of his father to supply the required financial assistance. The record reflects that the Petitioner is indeed an indigent. The trial court in overruling the Petitioner's motion to be declared an indigent did not find that he was not an indigent. The court denied the Petitioner's motion because of the timing of his motion and not for the fact that the Petitioner was not in fact an indigent for purposes of his appeal. (R. 6-8, Vol. II) The court did, however, order the preparation of a transcript of the proceedings upon Appellant's motion at the expense of the State. (R. 106, Vol. II) By this order providing a free transcript for the proceedings on the motion, the court tacitly recognized that

the Petitioner was an indigent and had no money with which to pay for the transcript.

The arguments for appointed counsel and for free transcripts at the State's expense to indigent defendants are usually couched in due process and equal protection clauses of the Fifth and Fourteenth Amendments as well as the Sixth and Fourteenth Amendments to the United States Constitution providing for right of counsel in criminal cases. The leading United States Supreme Court case requiring the State to provide counsel for an indigent defendant on appeal is *Griffin v. Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S.Ct. 585 (1955) and *Douglas v. California*, 372 U.S. 353, 9 L. Ed. 811, 83 S.Ct. 814. In the past, the Arkansas Supreme Court had, long before *Griffin v. Illinois*, recognized the constitutional requirement and permitted paupers to appeal their convictions, permitted a full transcript of the proceedings at the trial being furnished without cost, and with court appointed counsel directed to handle such appeals. *Manning v. State*, 246 Ark. 1013, 1016. In the *Manning* case, the Arkansas Supreme Court quoted the United States Supreme Court as follows:

> "A defendant whose indigency and desire to appeal are manifest does not have the services of his trial counsel on appeal, it simply cannot be inferred from the defendant's failure specifically to request appointment of appellate counsel that he has knowingly and intelligently waived his right to the appointment of appellate counsel." *Swenson v. Bosler*, 386 U.S. 258, 18 L. Ed. 2d 33, 87 S.Ct. 996 (1967).

The Arkansas Supreme Court went further in the *Manning* case at Page 1017 to state that the attorney for the Appellant should advise the court, within appeal time, that

he was not going any further with the case. This would also indicate that notification to the trial court within appeal time should be made of the Defendant's indigency with respect to the costs of appeal. The Arkansas Supreme Court further adopted and cited Federal Court decisions, among others, the *Weatherman v. Peyton*, 287 Fed. Sup. 819 (D.C. W. Va. (1968)), when the Court said:

> "For petitioner to be entitled to post conviction relief, because of an alleged violation of his Constitutional right, it is not enough to show that he was indigent or that his privately employed counsel was negligent in not perfecting an appeal. The petitioner must show some State action. 'State action' is shown when a responsible official of the State's system of justice rejects a request for counsel for a convicted defendant when he has knowledge of the defendant's indigency and desire for appellate counsel."

However, in the case Petitioner now presents for a Writ of Certiorari, the Arkansas Supreme Court has departed from its previous decisions, and, as the dissenting Justice, George Howard, Jr., said, "It is clear from the majority's opinion that a new and irrelevant dimension has been considered in determining whether one is entitled to proceed *in forma pauperis* in a criminal proceeding."

In the case at bar, the Petitioner filed a motion setting forth his claim, under oath, to be an indigent defendant and requested a transcript at the cost of the State and for the appointment of an attorney. This motion was filed, with a copy being sent to the judge approximately one month prior to the deadline for filing the transcript, and was within the appeal time. (R. 1, Supp. to Vol. II) Again, by letter dated December 21, 1977, Defendant's attorney

notified the trial judge of his request for a hearing on his motion. (R. 2, Supp. to Vol. II) The trial court took no action and the Petitioner, through counsel, filed a partial transcript with the Supreme Court and again renewed his motion to be declared an indigent, requesting a free transcript and appointment of counsel on appeal. The trial court was reinvested with jurisdiction to determine the motion upon hearing, and a hearing was held on January 11, 1978, after which an order denying the Petitioner's motion was entered of record on January 16, 1978. Therefore, State action was taken against the Petitioner who is clearly an indigent and unable to perfect his appeal.

In the Court's order denying Petitioner's motion, the Court stated, "The Defendant's attorney, at all times, advised Mrs. Steel not to start the transcript until such time as his client was in a position to pay for it." The Petitioner, by and through his attorney, respectfully challenges that finding in the Court's order. All of the evidence indicates that the court reporter would not begin the preparation of the transcript until a cost deposit of $1,500.00 was received by her. Nowhere in the evidence will there be found evidence that the Defendant's attorney advised Mrs. Steel not to start the transcript until such time as the Petitioner was in a position to pay for it.

Therefore, it is clear that all criminal defendants are entitled to an appeal and that indigent defendants unable to pay the costs of the appeal are entitled to counsel at the State's expense, as well as transcripts and court records necessary to perfect such appeal at the State's expense, all pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution providing for due process, equal protection and the right of counsel in criminal cases. Prior to the decision in the present case that right of the

indigent defendant had been affirmed by the decisions of the Arkansas Supreme Court and were firmly embedded in the substantive criminal law of Arkansas. However, unless the present decision is corrected by the issuance of a Writ of Certiorari in the United States Supreme Court, indigent, but able-bodied, criminal defendants will be denied their constitutional right to due process, equal protection under law and right to counsel.

The question raised by the trial court in denying the Petitioner's motion is one of timing more than the Petitioner's rights. The trial court, in its order, cited an Oklahoma case which is unclear to Petitioner's counsel. From the quoted portion of *Palmore v. State*, 61 Oklahoma Criminal 312, it appears that a defendant has six months within which to take an appeal, and notice of the appeal was not filed until two days before the expiration of the six month period and the transcript could not have been served and submitted within the remaining time. That does not have application to the case at bar for the reason that the Petitioner here gave notice to the court approximately one month before the expiration of the appeal time and had expended his efforts to raise the required capital for a period of two months after notice of the amount was given to him. Neither the Oklahoma case quoted nor the Arkansas Supreme Court case of *Galman v. Carnes*, cited by the trial court were cases dealing with an indigent defendant. The *Galman* case was a civil suit but the trial court makes references to the fact that the legislative purpose of Section 27-27.1 "was not to provide a means by which needless postponements could be obtained." The Petitioner now before the bar of this Court is not attempting to obtain needless postponements and in fact desires that his case be prosecuted expeditiously. The Petitioner testified at R.

42, "I'm not trying to put it off as long as I can. I wouldn't have put it off seven months. I wanted to get it over with but we just didn't have the money. I wanted to get my appeal over with. I didn't want to wait but we did not have the money to pay for it right then and we thought we could get it but we were wrong. I was sincere in thinking that I could get the money. I'm in a hurry for my appeal to be heard so I wouldn't have to, all the time, think about what's over me." The Petitioner further testified, "I didn't make my attorney or anyone else aware until the first of December of the fact that I would not be able to pay for my transcript for appeal or for my defense attorney for appeal or for any of the costs involved in the appeal of my case because we were still hoping our relatives would let us borrow the money. They told us they would try to get it, and they didn't give us a for-sure answer until then." (R. 41-42, Vol. II) He further testified that nothing had ever been said about indigency until the first of December when, as his father testified, they gave up on raising the money. Both the Petitioner and his father testified that they knew nothing about their right to have a court-appointed attorney or that the State would pay for their transcript if they were unable to do so. (R. 42, 49-51, 74-75, Vol. II)

The Petitioner's attorney respectfully submits that the Petitioner did not knowingly waive his rights as an indigent for an appointed counsel and for a transcript at the State's expense. Furthermore, the tender age and experience of this Petitioner and the fact that neither this Petitioner nor his father or mother had ever had the unpleasant experience of criminal proceedings must be taken into consideration in determining the reasonableness of waiting until the first of December to apprise the court of the Petitioner's financial status. In the experience of the Petitioner's

attorney, the trial courts ordinarily expect and demand the petitioners to carry as much of the financial burden of their defense as is possible. Under ordinary circumstances, the determination of this Petitioner and his father would be laudable. Petitioner's attorney would submit that it is not possible to draw a clear and distinct line before which this young petitioner and his father should have apprised the court of their financial condition. Indeed, they did not apprise their own attorney. Perhaps their greatest sin was their determination to be financially independent and their optimism in being able to do so.

The majority's opinion stated:

> "Needless to say, there is evidence from which the trial court could have found that appellant qualified as an indigent. On the other hand we see an able-bodied young man, a high school graduate, who has worked only seven weeks from June 3, 1977, the date of his conviction, until January 11, 1978, while living with his father, rent free. Furthermore, the records shows that during all of this time appellant has enjoyed the advantages of remaining free on a $15,000 bond posted by his relatives. Since the trial court had the advantage of viewing the witnesses and in view of the indicia of wealth that appellant has enjoyed following his conviction, together with the tardiness of the application, we cannot say that the trial court abused his discretion in denying appellant's application to proceed as an indigent on appeal.

Courts like Caesar's wife must be above reapproach in not only the eyes of the appellant and his family but also those of the rape victim and her family. The longer an appellant enjoys his freedom from a conviction

> through the the luxury of that which is an indicia of wealth, the more suspect becomes a belated assertion to his peers that he is in fact an indigent." (R. 112-113, Vol. II)

Quoting Justice George Howard, Jr. from his dissenting opinion:

> "The action of the trial court in denying appellant's motion to appeal *in forma pauperis* or as an indigent gives more recognition to timing[2] than to constitutional rights.[3] The attitude and action of the trial court is comparable in many respects where form, in legal proceedings, is indefensibly raised to the lofty position of substance.
>
> It is so basic and fundamental under American Jurisprudence that a right of constitutional dimension can be asserted at any stage of a legal proceeding, unless it is clear and certain that a waiver of such constitutional right has been knowingly, understandingly and intelligently made, that it is proper to characterize such a principle as elementary . . .
>
> It is readily apparent that the majority has now created a new and irrelevant criterion in determining whether one may or may not qualify as an indigent, namely, 'able bodied young man,' but it goes without

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[2] It is beyond contradiction that the record shows plainly that appellant is an indigent.

[3] **Griffin v. Illinois**, 351 U.S. 12 (1955) and **Douglas v. California**, 372 U.S. 353, are leading United States Supreme Court cases requiring the State to provide counsel and transcripts at the cost of the State for indigent defendants on appeal.

saying, indigency neither favors the old over the young, nor the weak over the strong. If ablebodiedness is a factor to be considered in determining whether one pursues an appeal *in forma pauperis*, very few, indeed, would meet the test.[4] I, therefore, dissent."

[4] The trial court found that the transcript could not have possibly been prepared by the court reporter since there were only fifteen working days remaining before the maximum time of seven months allowed for an appeal to be taken. In **West v. Smith**, 224 Ark. 351, 278 S.W.2d 126, we held that this Court under its inherent constitutional power may allow a transcript to be filed after the time fixed by the statute. (R. 115-116, Vol. II)

CONCLUSION

The Petitioner is an indigent and was throughout these proceedings. His father consumed his entire ability to borrow in the defense of his son through the trial of this cause. The fact that he could not raise additional monies was not made known to him until the first of December, 1977, when his last hopes were denied by relatives. From the testimony, this Petitioner and his father utilized all available sources to raise the money, notwithstanding that the father did not have a legal duty to pay for his son's legal defense.

Petitioner's attorney respectfully submits that the trial court and the Arkansas Supreme Court erred in denying his motion to be declared an indigent, for the appointment of counsel and for a transcript of the court's proceedings at the cost of the State. In so doing, Arkansas courts have denied the Petitioner rights secured and guaranteed to him under the Fifth, Sixth and Fourteenth Amendments for due process, equal protection under law regardless of his lack of financial means and a right to counsel on appeal. Petitioner respectfully prays that this Honorable Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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Appendix

APPENDIX "A"

IN THE CIRCUIT COURT OF LITTLE RIVER COUNTY, ARKANSAS

STATE OF ARKANSAS ..... *Plaintiff*

vs. Docket No. CR-76-39

FINIS EUGENE TOOMER, JR. ..... *Defendant*

ORDER DENYING MOTION AS AN INDIGENT DEFENDANT, FREE TRANSCRIPT AND APPOINTMENT OF ATTORNEY

On this 11th day of January, 1978, the same being a regular day of the January, 1978 term of the Little River County Circuit Court comes on for consideration the defendant's motion in the above cause that was filed on December 9, 1977; the State of Arkansas appearing through its Prosecuting Attorney, Mr. George Steel, Jr., and his Deputy Prosecuting Attorney for Little River County, Mr. Eric Bishop; the defendant appearing in person and through his retained attorney, Mr. David Potter, and from said motion, oral testimony, exhibits, and other proof, the Court finds:

The defendant was convicted of rape after a three day trial on June 1, June 2, and June 3, 1977. On June 3, 1977, in compliance with the jury verdict, the Court sentenced the defendant to a term of five (5) years in the Department of Correction. On the same day, June 3, 1977, the defendant gave notice of appeal and his appeal bond was set in the sum of $15,000.00. The bond was approved by the Sheriff,

and he has at all times been free of confinement and under bond.

The Court Reporter of the Ninth Judicial Circuit, Mrs. Daisy B. Steel, made demand on the defendant's attorney on several occasions between June 3, 1977, and December 9, 1977, requesting permission for her to proceed with the transcript of the evidence in this case. The defendant's attorney, at all times advised Mrs. Steel not to start the transcript until such time as his client was in a position to pay for it.

On December 9, 1977, the defendant, through his attorney, filed a motion in this Court alleging that he was indigent, that the State be directed to provide the cost of the transcript, and that an attorney be appointed to represent him in this appeal.

The Court finds that the appeal for indigency was not filed for more than one (1) year after this case was originally filed in the Little River County Circuit Court; that the appeal for indigency pertaining to the appeal was not filed for more than six (6) months after notice of appeal had been granted and only some fifteen (15) working days before the expiration of the maximum time of seven (7) months allowed for an appeal to be taken. The Court finds that the transcript could not have possibly been prepared by the Court Reporter and completed by the Clerk within the said fifteen (15) working days.

It is therefore my judgment that the appeal should be denied as was stated in *Palmore v. State,* 61 Oklahoma Criminal 312, and I quote, "Where the appeal was not filed until two (2) days before the expiration of the six (6) months allowed for the appeal to be taken, and the tran-

script could not have been served and submitted within the remaining time, the application was properly denied."

The Supreme Court pointed out in *Galman v. Carnes,* (254 Ark. 155), "The legislative intent in the enactment of Section 27-27.1 was to eliminate unnecessary delay in the docketing of appeals to the Supreme Court. Certainly, the legislative purpose was not to provide a means by which needless postponements could be obtained. We expect compliance with the spirit of the statute, to the end that lawsuits may progress as expeditiously as justice requires."

IT IS THEREFORE BY THIS COURT CONSIDERED, ORDERED AND ADJUDGED that the defendant's motion for indigency, free transcript, and appointment of counsel should be and the same is hereby denied. The defendant is permitted to remain on his present bond until such time as the Arkansas Supreme Court has an opportunity to rule on the defendant's motion.

/s/ Bobby Steel
Circuit Judge

APPENDIX "B"

SUPREME COURT OF ARKANSAS

No. CR 77-242

FINIS EUGENE TOOMER, JR. *Appellant* v. STATE OF ARKANSAS, *Appellee*	Opinion Delivered JUN. 5, 1978 Appeal From Little River Circuit Court BOBBY STEEL, *Circuit Judge* Affirmed

CONLEY BYRD, *Associate Justice*

Appellant Finis Eugene Toomer, Jr., was charged with rape, November 23, 1976. He was arraigned December 8, 1976, and the trial date was set for January 12, 1977. On the latter date the trial was continued at his request until April and again continued until June 1, 1977. The jury returned a verdict of guilty and fixed his punishment at 5 years in the Department of Corrections. Prior to his trial appellant had the benefit of $10,000 property bond executed by his relatives. Following his conviction appellant has remained free on a $15,000 property bond executed by his relatives. After obtaining the full 7 month extension for obtaining a transcript, appellant did not furnish the $1,500 necessary to obtain a copy of the transcribed testimony from the court reporter. Shortly before the 7 months extension expired, appellant, December 8, 1977, made application to the trial court and this court to obtain the record as an indigent. We reinvested the trial court with jurisdiction to hear the application and extended the time for appeal until the matter could be heard and determined. The trial court after hearing the testimony of appellant, his

father and the court reporter denied appellant's application to proceed as an indigent. Appellant appeals from that ruling. For the reasons hereinafter set forth, we affirm the trial court.

The record shows that appellant was represented by employed counsel from the beginning. Throughout the time following the conviction on June 3, 1977, until the application for indigency was filed the employed lawyer kept appellant informed of the necessity of obtaining the transcribed testimony and that the court reporter was demanding a deposit of $1,500 to start the transcribing.

Appellant testified that he became 19 on January 10, 1978, and that following his conviction he had only earned $422.40 from Texas Steel Company, and $150.00 from his present employer, Mr. Mike Powell. He had depended on the members of his family to help him raise the appeal money, but they never did come up with the money. He did not know that he could apply to take an appeal as an indigent until shortly before his application on December 8, 1977. Appellant says that his father paid for his defense at trial. He thought it was around $3,000.00. Appellant's mother and father are divorced. The mother is drawing disability from Social Security as a result of a sleeping disease. Appellant has lived with his father since the charges were brought and is not paying rent. He admittedly is an able bodied young man.

Appellant's father testified that he was earning $1,200 per month and that he had borrowed all the money he could get from his employer to pay the $3,000 for appellant's trial defense. His three children, ages 20, 19 and 17 lived with him in a rented apartment. The father had tried to borrow the money to pay for appellant's appeal but had been unable

to obtain it. The father testified that appellant had lived with him following the conviction. During that time appellant had worked something like seven weeks. In response to questions from the court, the father stated that appellant's activities during the day were not much. Appellant would go up to a service station, stay up there with the father's brother-in-law, and appellant would visit with his mother some.

Needless to say, there is evidence from which the trial court could have found that appellant qualified as an indigent. On the other hand we see an able bodied young man, a high school graduate, who has worked only seven weeks from June 3, 1977, the date of his conviction, until January 11, 1978, while living with his father, rent free. Furthermore, the records shows that during all of this time appellant has enjoyed the advantages of remaining free on a $15,000 bond posted by his relatives. Since the trial court had the advantage of viewing the witnesses and in view of the indicia of wealth that appellant has enjoyed following his conviction, together with the tardiness of the application, we cannot say that the trial court abused his discretion in denying appellant's application to proceed as an indigent on appeal.

Courts like Caesar's wife must be above reapproach in not only the eyes of the appellant and his family but also those of the rape victim and her family. The longer an appellant enjoys his freedom from a conviction through the luxury of that which is an indicia of wealth, the more suspect becomes a belated assertion to his peers that he is in fact an indigent.

Affirmed.

Howard, J., dissents.

APPENDIX "C"

SUPREME COURT OF ARKANSAS

No. CR 77-242

FINIS EUGENE TOOMER, JR,, *Appellant* v. THE STATE OF ARKANSAS, *Appellee*	Opinion Delivered JUN. 5 ,1978 Appeal From The Circuit Court of Little River County HONORABLE BOBBY STEEL, *Circuit Judge* Dissenting

GEORGE HOWARD, JR., *Justice*

GEORGE HOWARD, JR., J. Dissenting. I am compelled to dissent from the holding of the majority in this case inasmuch as it is clear from the majority's opinion that a new and irrelevant dimension has been considered in determining whether one is entitled to proceed *in forma pauperis* in a criminal proceeding.

Among other things, the appellant alleged in his motion, in order to be declared an indigent to the end that the State be required to provide the cost of a transcript and that an attorney be appointed to represent him in his appeal to this Court, the following relevant parts:

> "That Finis Eugene Toomer, Jr. is 18 years of age. . . . That the Defendant was convicted of the felony offense of rape . . .
>
> "The Court Reporter, . . . has requested $1,500.00 advancement on the cost of the transcript in this cause

and the Defendant has nothing to pay toward that transcript.

"That Defendant is indigent and cannot pay the cost of the appeal in this case. He is unemployed and has been for more than four months, although he has diligently sought employment. The outstanding conviction has hindered his employment opportunities and the Defendant has found it impossible to obtain employment or any other means to raise the money to pay the cost of appeal."[1]

The trial court in denying appellant's request to appeal his conviction as an indigent, made the following findings:

"The Court Reporter . . . made demand on the defendant's attorney on several occasions between June 3, 1977, and December 9, 1977, requesting permission for her to proceed with the transcript of the evidence in this case. The defendant's attorney, at all times, advised . . . not to start the transcript until such time as his client was in a position to pay for it.

"On December 9, 1977, the defendant, through his attorney, filed a motion in this Court alleging that he was an indigent, that the State be directed to provide the cost of the transcript, and that an attorney be appointed to represent him in this appeal.

"The Court finds that the appeal for indigency was not filed for more than one (1) year after this cause was originally filed in the Little River County Circuit Court; that the appeal for indigency pertaining to the

[1] Appellant duly executed and filed his affidavit in support of his request to proceed **in forma pauperis** which clearly supports his claim of indigency.

appeal was not filed for more than six (6) months after notice of appeal had been granted and only some fifteen (15) working days before the expiration of the maximum time of seven (7) months allowed for an appeal to be taken. The Court finds that the transcript could not have possibly been prepared by the Court Reporter and completed by the Clark within the said fifteen (15) working days."

The action of the trial court in denying appellant's motion to appeal *in forma pauperis* or as an indigent gives more recognition to timing[2] than to constitutional rights.[3] The attitude and action of the trial court is comparable in many respects where form, in legal proceedings, is indefensibly raised to the lofty position of substance.

It is so basic and fundamental under American Jurisprudence that a right of constitutional dimension can be asserted at any stage of a legal proceeding, unless it is clear and certain that a waiver of such constitutional right has been knowingly, understandingly and intelligently made, that it is proper to characterize such a principle as elementary.

In sustaining the trial court's action, which in effect forecloses appellant from appealing his conviction, the majority makes the following observation in its opinion:

"Needless to say, there is evidence from which the trial court could have found that appellant qualified as

[2] It is beyond contradiction that the record shows plainly that appellant is an indigent.

[3] **Griffin v. Illinois**, 351 U.S. 12 (1955) and **Douglas v. California**, 372 U.S. 353, are leading United States Supreme Court cases requiring the State to provide counsel and transcripts at the cost of the State for indigent defendants on appeal.

an indigent. On the other hand we see *an able bodied young man, a* high school graduate, who has worked only seven weeks from June 3, 1977, the date of his conviction, until January 11, 1978, while living with his father, rent free. Furthermore, the records show that during all of this time appellant has enjoyed the advantages of remaining free on a $15,000 bond posted by his relatives. Since the trial court had the advantage of viewing the witnesses and in view of the indicia of wealth that appellant has enjoyed following his conviction, together with the tardiness of the application, we cannot say that the trial court abused his discretion in denying appellant's application to proceed as an indigent on appeal." (Emphasis added)

It is readily apparent that the majority has now created a new and irrelevant criterion in determining whether one may or may not qualify as an indigent, namely, "able bodied young man," but it goes without saying, indigency neither favors the old or the young, or the weak over the strong. If ablebodiedness is a factor to be considered in determining whether one pursues an appeal *in forma pauperis*, very few, indeed, would meet the test.[4] I therefore, dissent.

[4] The trial court found that the transcript could not have possibly been prepared by the court reporter since there were only fifteen working days remaining before the maximum time of seven months allowed for an appeal to be taken. In **West v. Smith**, 224 Ark. 651, 278 S.W.2d 126, we held that this Court under its inherent constitutional power may allow a transcript to be filed after the time fixed by the statute.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-373

[redacted] Petitioner

vs.

[redacted] Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE [redacted]

BRIEF IN OPPOSITION FOR RESPONDENT

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TABLE OF CASES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-

FINIS EUGENE TOOMER ..... *Petitioner*

vs.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION TO CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of Arkansas was rendered on June 5, 1978, and is reported at 263 Ark. 595 (1978). The majority opinion is reprinted in Appendix B of the Petition for Writ of Certiorari and a dissenting opinion, contemporaneously filed, is reprinted in Appendix C of the Petition. An unpublished opinion of the trial court is included in the Petition as Appendix A.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the Arkansas Supreme Court erred in affirming the trial court's order denying Petitioner's motion to proceed *in forma pauperis*.

CONSTITUTIONAL PROVISIONS

The pertinent provisions of the Constitution of the United States are set forth in the Petition at pp. 2 and 3.

STATEMENT OF THE CASE

On November 23, 1976, Petitioner was charged with rape, in violation of Ark. Stat. Ann. § 41-1803 (Code 1976), via an Information filed in Little River County Circuit Court. The Petitioner apparently pleaded "not guilty" and was tried before a jury on May 31, 1977, in Little River County Circuit Court, the Honorable Bobby Steel presiding. The jury returned a verdict of "guilty" and sentenced the Petitioner to five (5) years' imprisonment in the penitentiary. The trial court formally entered its judgment on the verdict on June 3, 1977, and on the same day Petitioner filed his Notice of Appeal, whereupon the trial court set appeal bond at $15,000, which the Petitioner made.

On June 13, 1977, the trial court granted the petitioner the maximum seven-month extension in which to docket his appeal, extending the date to January 3, 1978. On December 7, 1977, the petitioner filed a motion in Circuit Court seeking to be declared an indigent and asking that the state bear the cost of producing the record. The circuit judge was ill, and on

December 30, 1977, the petitioner filed a Motion for Extension of Time to File a Complete Transcript and a Motion to Declare the Defendant an Indigent in the Arkansas Supreme Court.

The State responded to this Motion, and on January 16, 1978, the Arkansas Supreme Court entered an Order granting the Extension of Time and reinvesting the trial court with jurisdiction to determine the question of indigency. The trial court had, in fact, conducted a hearing on that issue on January 11, 1978, and in an Order of January 16, 1978, denied the Petitioner's Motion to Proceed as an Indigent.

The petitioner then filed an appeal of this Order, filing a transcript of the indigency hearing and his Motion for Permission to File a Typewritten Brief with the Arkansas Supreme Court on February 3, 1978. The State responded to this Motion on February 13, 1978, and the Petitioner's Motion was denied by the Court on February 20, 1978.

Subsequently, the petitioner filed an appeal to the Arkansas Supreme Court on the same issue before the Court on February 3, 1978, and the decision of the trial court was affirmed on June 5, 1978, Howard, J., dissenting, reported at 263 Ark. 595 (1978).

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DENYING PETITIONER'S MOTION TO BE DECLARED AN INDIGENT, FOR THE TRANSCRIPT AND RECORD AT THE COUNTY'S EXPENSE, AND FOR THE APPOINTMENT OF COUNSEL ON APPEAL.

Respondent respectfully submits that the proper question to be addressed to this Court is not whether "an indigent, but able-bodied individual, having been convicted of a felony, and desiring an appeal to the Court of last resort in the State is entitled to a transcript with which to appeal and the appointment of counsel on appeal" (Brief for Petitioner, p. 2); but rather, whether the trial court abused its discretion in denying indigency status to the petitioner under the particular facts and circumstances of this case.

The question as presented by Petitioner was long ago addressed by this Court in *Griffin* v. *Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1955) and *Douglas* v. *California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963). The State of Arkansas does not question the right of an indigent defendant to a record of his trial and representation by counsel on appeal. The sole question presented, rather, is whether Petitioner legitimately qualifies as an indigent.

The relevant facts upon which the Arkansas Supreme Court relied in affirming the trial court's determination that Petitioner was ineligible for an adjudication of indigency are as follows. Petitioner was a 19 year old, single male (V. II, T. 40), a high school graduate (V. II, T. 15), and a former athlete

without physical defects (V. II, T. 40). He was represented by private, retained counsel at his trial (V. II, T. 25, 26, 41, 44, 48) and has been free on $15,000 bond since his trial (V. I, T. 37; V. II, T. 42). No one had discussed the possibility of applying for indigency status with him until December, 1977 (V. II, T. 29, 42, 50, 51). He had been employed in the past (V. II, T. 16, 22, 23), had been living with his father in Texas for some time since the trial, and had no living expenses (V. II, T. 37, 38, 40, 41). He did not look for a job in the Ashdown, Arkansas, area (V. II, T. 39), and had never applied for unemployment benefits (V. II, T. 39). Petitioner had been employed since mid-December, 1977, with a subcontracting firm in Texas, installing windows at an alleged rate of $2.50 per window (V. II, T. 22, 23), and, at the time of his hearing, had made $150.00 in seventeen days (V. II, T. 40)

The Court in *Dreyer* v. *Jalet*, 349 F. Supp. 452, 459 (S.D. Tex. 1972), said:

> In order to preclude fraudulent or careless motions of poverty, the applicant moving for *in forma pauperis* status should state "with some particularity, definiteness and certainty" the facts as to his poverty. *Jefferson* v. *United States*, 277 F. 2d 723, 725 (9th Cir.), cert. den., 364 U.S. 896, 81 S. Ct. 227, 5 L. Ed. 2d 190 (1960). Further, when the totality of the circumstances involved are weighed against the applicant's statement of poverty, and the result suggests incongruity, the court may go beyond the mere statement of income and inquire into additional relevant matters including the applicant's earning capacity and ability.

The incongruity herein is manifest. Petitioner alleged in his Motion to Declare the Defendant an Indigent that he has "diligently sought employment" and "has found it impossible to obtain employment or any other means to raise the money to pay the cost of appeal." (V. II, T. 2) The testimony at the hearing, however, belies that assertion. Petitioner's attempts to secure employment were not diligent, he being able to name only four places where he had filled out formal applications (V. II, T. 27), aside from the two temporary or part-time jobs he obtained through the efforts of members of his immediate family. The testimony thereby demonstrated the incongruity of Petitioner's assertions.

Petitioner's reliance on the reasoning in the dissent written by Justice George Howard, Jr., of the Arkansas Supreme Court, is misplaced, as the volley levelled therein hits wide of the mark. Justice Howard's objection is based on what he views as the majority's reliance on the bare facts of Petitioner's physical ability and the lateness of the request for a free transcript and appointed counsel. However, the majority's basis for its affirmation of the trial court's denial, subtly articulated, is that the trial court did not abuse its discretion since Petitioner did not demonstrate good faith or reasonable diligence in his attempt to raise the money required for his appeal.

As the Supreme Court of Washington so aptly stated, ". . . we do not deem it an undue burden upon Petitioner to require that he demonstrate to the court a good faith effort on his part to fully utilize his credit and business assets before turning to the public coffers." *State* v. *Rutherford*, 63 Wash. 2d 949, 956, 389 P. 2d 895 (1964). Petitioner herein has failed to meet the burden of showing a good faith effort to raise the money required for his

appeal, a determination the trial court reasonably made from the testimony at the hearing.

"To proceed *in forma pauperis* is a privilege, not a right," *Smart* v. *Heinze*, 347 F. 2d 114, 116 (9th Cir.), *cert. denied*, 382 U.S. 896 (1965), and the granting of permission to proceed *in forma pauperis* is within the sound discretion of the court. *Willer* v. *Dickson*, 314 F. 2d 598 (9th Cir. 1963). There must be a clear abuse of the court's discretion in order to justify revising a refusal of permission to proceed *in forma pauperis* (CF. 56 Geo. L. J. 516, 525 [1968]). Here the petitioner has not demonstrated such abuse.

CONCLUSION

For the reasons and authorities set forth herein, respondent prays that a writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ray Hartenstein, Assistant Attorney General, do hereby certify that a copy of the foregoing Brief for Respondent In Opposition has been served upon petitioner by placing three (3) copies of the same in the United States mail, postage prepaid, to Potter & Potter, Attorneys at Law, 522 Hickory Street, Texarkana, Arkansas 75502, attorneys for the petitioner, on this 21st day of November, 1978.

RAY HARTENSTEIN
ASSISTANT ATTORNEY GENERAL